No. 78-121

In the Supreme Court of the United States

OCTOBER TERM, 1978

THEODORE THOMAS CURTIS AND
KEVIN ANDREW CURTIS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-10) is reported at 562 F. 2d 1153. The opinion of the district court is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1977. A petition for rehearing was denied on March 10, 1978. The petition for a writ of certiorari was

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[1]The district court's opinion, which was not filed with the petition, is attached hereto as an Appendix.

filed on July 5, 1978, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the installation and use of an electronic tracking device on a rental aircraft with the express consent of the airplane's owner, before petitioners took control of it, violated petitioners' Fourth Amendment rights.

2. Whether federal officers had probable cause to search the truck in which marijuana was found.

3. Whether the evidence was sufficient to support the conviction of petitioner Theodore Curtis.

STATEMENT

Following a non-jury trial in the United States District Court for the District of Arizona, petitioners were convicted of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Both were fined $1500 and sentenced to six months' imprisonment, to be followed by four years' probation and two years' special parole. The court of appeals affirmed (Pet. App. A-1 to A-10).

The evidence at trial[2] showed that in October 1976 petitioner Theodore (Ted) Curtis rented a Piper Navajo aircraft from Riverside Air Service in Riverside, California (I Tr. 11-12). After Curtis returned the airplane on October 15, Joe Pagan, one of the owners of the air service, suspected that it may have been used for

[2]The parties stipulated that the facts adduced at the suppression hearing would also constitute the trial record (II Tr. 232).

transporting marijuana. Pagan saw what he believed might be marijuana debris inside the aircraft. He also noticed that one of the seats appeared to have been removed and improperly reinstalled and that a door had been damaged (I Tr. 18-22). Marks on the propellers indicated that the airplane had been used on dirt or gravel airstrips (I Tr. 18). Although the invoice for the rental of the plane showed that it would be based in Las Vegas, Curtis had told Pagan that he wanted to use the plane for a trip east (I Tr. 33-34). Pagan also noticed from the gas receipts submitted by Curtis that the plane had been refueled more than should normally have been required, considering the range of the aircraft and the destinations indicated (I Tr. 53-54).

On October 26, Ted Curtis arranged to rent the Piper Navajo again, beginning on November 3, 1976 (I Tr. 38). On November 1, Pagan contacted Customs officials, conveyed his suspicions about Curtis, and requested that a "beeper"[3] be installed on the aircraft in order to monitor its movements (I Tr. 26-27). The beeper was installed on November 2, with the written permission of Pagan, and Ted Curtis took possession of the plane on November 3 (I Tr. 27-29).

Between November 3 and November 10, federal agents tracked the aircraft with the aid of the beeper. In the early hours of November 10, signals from the transponder indicated that the airplane was traveling south toward the Mexican border (II Tr. 88). The signal was lost when the plane was near Dateland, Arizona, approximately 40 miles north of the border. At 2:40 a.m., however, the

[3]A "beeper" is an electronic tracking device, also commonly called a transponder, which, when activated, transmits a signal indicating the approximate location of the person, object, or vehicle to which it is attached.

signal was received once again, and the plane was tracked flying north from the same area (II Tr. 88, 57). The signal was lost when the plane was about 30 miles south of Wenden, Arizona (II Tr. 57). The next evening the aircraft was tracked making a similar flight, and the signal was again lost in the vicinity of Wenden, Arizona at about 1:00 a.m. on November 11 (II Tr. 89, 60-61). A Customs Bureau aircraft that had been attempting to intercept the Navajo then proceeded to an abandoned airstrip near Wenden where, with the aid of an infrared surveillance device, Customs agents detected an airplane with the configuration of a Piper Navajo parked on the unused airstrip (I Tr. 103-104; II Tr. 3-5). The officials observed two land vehicles approach the aircraft and remain there for five to ten minutes (I Tr. 104-106). At about 1:10 a.m. the airplane took off again and the ground vehicles drove away (I Tr. 106). Neither the parked aircraft nor the land vehicles displayed any lights, and the aircraft took off without the use of its running lights (I Tr. 106; II Tr. 5, 9). The airborne Customs agents followed the two ground vehicles as they traveled about one mile to an interstate highway, where the headlights were turned on for the first time. The first vehicle, which the agents could then identify as a camper truck, started west on the highway, then made a U-turn and proceeded in an easterly direction (I Tr. 109; II Tr. 8-9). The agents signalled other agents on the ground to stop the camper, and the driver, petitioner Kevin Curtis, was arrested. A search of the truck revealed some 400 pounds of marijuana (II Tr. 35-37, 231). The Navajo was again tracked flying towards Phoenix, and when it landed at Litchfield, just west of Phoenix, Customs agents arrested petitioner Ted Curtis, the pilot, and two other occupants of the aircraft (II Tr. 62-64).

ARGUMENT

1. Petitioners contend (Pet. 11-24) that the installation and use of the beeper on the rented aircraft violated their Fourth Amendment rights.

The courts of appeals have distinguished between the interests affected by the initial attachment of a beeper and its subsequent use. Where the beeper has been installed with the consent of the owner of a vehicle, the installation has uniformly been upheld against Fourth Amendment challenges by persons who subsequently leased the vehicle from the consenting owner. See *United States* v. *Miroyan*, 577 F. 2d 489 (C.A. 9), certiorari pending, Nos. 78-5141 and 78-5171; *United States* v. *Cheshire*, 569 F. 2d 887 (C.A. 5), certiorari denied, No. 77-6586, June 19, 1978; *United States* v. *Abel*, 548 F. 2d 591 (C.A. 5), certiorari denied, 431 U.S. 956; *Houlihan* v. *State*, 551 S.W. 2d 719 (Tex. Crim. App.), certiorari denied, 434 U.S. 955. See *Miroyan* v. *United States*, Nos. A-99 and A-87, decided August 8, 1977 (Rehnquist, Circuit Justice).

The courts have adopted divergent views on whether the subsequent use of a lawfully installed beeper to monitor the location of a vehicle implicates Fourth Amendment privacy interests. Compare *United States* v. *Hufford*, 539 F. 2d 32, 34 (C.A. 9), certiorari denied, 429 U.S. 1002 (no privacy interest implicated), with *United States* v. *Moore*, 562 F. 2d 106, 111 (C.A. 1), and *United States* v. *Frazier*, 538 F. 2d 1322 (C.A. 8), certiorari denied, 429 U.S. 1046 (limited privacy interest implicated).[4] Yet even those courts that have concluded

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[4] *United States* v. *Holmes*, 537 F. 2d 227 (C.A. 5) (*en banc*), heavily relied upon by petitioners, was an affirmance by an evenly divided court of appeals of a district court ruling in the defendants' favor. The use of beepers in circumstances similar to those presented here

that use of a beeper touches some protected Fourth Amendment interests have recognized that the method is substantially less intrusive than other forms of search or surveillance. See *United States* v. *Moore, supra; United States* v. *Frazier, supra;* cf. *Cardwell* v. *Lewis,* 417 U.S. 583, 590. A beeper does not monitor private conversations or serve any function other than assisting in locating a vehicle, and it is therefore scarcely more intrusive than other aids to visual surveillance, such as radar. Moreover, whatever legitimate expectation of privacy an individual may ordinarily have in his location on the public roads or airways (and we believe it is little or none) is considerably diminished by his use of a rented vehicle, since he must bear the risk "that the owners of the plane might consent to such investigative activity" (*United States* v. *Cheshire, supra,* 569 F. 2d at 889 n. 3). In those circumstances, even if the use of a beeper constitutes a "search" for Fourth Amendment purposes, it is reasonable when the officers obtain the consent of the owners of the vehicle to such use, especially when, as here, the officers had a well-founded suspicion that criminal activity was afoot. That conclusion is consistent with all other decisions involving similar circumstances (*United States* v. *Miroyan, supra; United States* v. *Cheshire, supra; United States* v. *Abel, supra*) and does not warrant this Court's review.

The fact that the beeper was installed after petitioner Ted Curtis contracted to lease the airplane but before he actually took possession of it does not distinguish this

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has been approved by the Fifth Circuit (*United States* v. *Cheshire, supra; United States* v. *Abel, supra; United States* v. *Perez,* 526 F. 2d 859, certiorari denied, 429 U.S. 846), and that court has pointed out that the question whether the use of a beeper constitutes a search is still an open question in the Fifth Circuit. *United States* v. *Cheshire, supra,* 569 F. 2d at 888.

case from cases such as *Cheshire,* where the beeper was placed on the airplane before the rental agreement was made. Curtis had arranged to rent the airplane beginning on November 3, and the beeper was placed on it on November 2, one day before petitioner took possession of it and the rental period began. As the court of appeals explained (Pet. App. A-8 to A-9 n. 1), the owner of an aircraft has full dominion and control over it prior to the commencement of a rental period and therefore has the right to install any instrument that would not be dangerous to the occupants of the plane. See also *United States* v. *Miroyan, supra,* 577 F. 2d at 493; *United States* v. *Abel, supra,* 548 F. 2d at 592; cf. *United States* v. *Hufford, supra,* 539 F. 2d at 34. This case therefore bears no resemblance to *Stoner* v. *California,* 376 U.S. 483, and *Chapman* v. *United States,* 365 U.S. 610, where the owner of a house and a hotel consented to searches of rented rooms after the tenants had taken possession and placed their personal belongings in the rooms.

2. Petitioners also contend (Pet. 5, 24-26) that the officers lacked probable cause to search the camper truck driven by Kevin Curtis because the circumstances surrounding the late-night rendezvous on the deserted airstrip were capable of an innocent interpretation. It is well-established, however, that a probable cause determination does not require law enforcement officers to view the facts in the light most favorable to suspects and to credit any possible innocent explanation for their behavior. *United States* v. *Lewis,* 556 F. 2d 385 (C.A. 6). Instead, a probable cause determination is "an act of judgment formed in the light of the particular situation and with account taken of all the circumstances." *Brinegar* v. *United States,* 338 U.S. 160, 176. And that judgment is guided by "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* at 175.

There were so many suspicious circumstances in this case that an innocent explanation for petitioners' activities is highly implausible. The previous discovery of what appeared to be marijuana debris by Pagan, the flight patterns to and from the border area, the hour of the night that the flight took place, the activity observed on the unlighted, deserted airstrip, and the vehicles' surreptitious driving patterns made it appear likely that a smuggling operation was taking place and that contraband had been loaded into one of the vehicles. See *United States* v. *Coplen*, 541 F. 2d 211, 215 (C.A. 9), certiorari denied, 429 U.S. 1073; *United States* v. *Young*, 535 F. 2d 484, 487-488 (C.A. 9), certiorari denied, 429 U.S. 999. The search of the camper truck was thus entirely lawful. *Chambers* v. *Maroney*, 399 U.S. 42; *Carroll* v. *United States*, 267 U.S. 132.

3. Finally, petitioner Theodore Curtis contends (Pet. 26-29) that the evidence was insufficient to support his conviction for possession of marijuana because there was no proof that it was his airplane that made contact with the truck, or that the marijuana was actually transferred from the airplane to the truck.

Viewing the evidence in the light most favorable to the government, there was ample evidence from which the trier of fact could infer that Theodore Curtis had transported the marijuana in the airplane he was piloting and had transferred it to the camper truck. The Customs agents had testified that they were not aware of any other beeper installations in that area and on that date except the one in the Piper Navajo rented by Curtis (II Tr. 57, 97). Curtis's plane was tracked to the immediate vicinity of the deserted military airstrip, where Customs agents observed an airplane and two trucks, one of which was shortly afterwards found to be transporting marijuana. The signal from the Piper Navajo was again picked up,

indicating that the aircraft was heading east towards Phoenix, and Curtis was arrested after landing at Litchfield, just west of Phoenix. Although the actual transfer of marijuana from the airplane to the truck was not observed in the darkness, the circumstantial evidence is sufficient to prove possession by Ted Curtis. *United States* v. *Evers*, 552 F. 2d 1119, 1121 (C.A. 5), certiorari denied, 434 U.S. 926. As the district court concluded from its review of all the evidence, "[t]he inference is inescapable that there was marijuana aboard the Navajo which was loaded and found in the pickup truck" (App., *infra*, p. 6a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1978.

DOJ-1978-09

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CR 76-470-PHX

UNITED STATES OF AMERICA,
Plaintiff,

v.

THEODORE THOMAS CURTIS, DALE PETER CORDOVA,
JOHN PHILLIP DULIN, and KEVIN ANDREW CURTIS,
Defendants.

FINDINGS OF FACT

As to defendants Theodore Curtis and Dale Cordova, I find:

The defendants were charged in three counts with conspiracy to import marijuana (21 U.S.C. § 963), the importation of marijuana (21 U.S.C. §§ 952(a) and 960(a)(1) and 18 U.S.C. § 2) and possession with intent to distribute marijuana (21 U.S.C. § 841(a)(1) and (b) and 18 U.S.C. § 2). Motions to suppress and to sever were filed on behalf of all of the defendants. The court granted the motions in part, and thereafter, by written stipulation, agreed that if Counts I and II were dismissed, Count III might be tried to the court without a jury on the record made at the hearing on the various motions, together with a stipulation made in open court that the truck which was seized at the time of the arrest of Kevin Curtis had in it approximately 400 pounds of marijuana.

In September 1976 defendant Theodore Thomas Curtis (hereafter Ted Curtis) approached Riverside Air Service in Riverside, California, and inquired about renting an aircraft. Learning that, in order to rent a twin-engine Piper

Navajo, he would be required to fly it 10 hours with a check pilot, Curtis rented a Navajo N-54727 (hereafter the Navajo) and flew it for the required time. On October 4, 1976, Ted Curtis rented the plane. It was returned on October 15, 1976. In the interim it had been flown 36.7 hours. The rental rate was $150.00 per hour. When the plane was returned, Joseph Pagan, one of the owners of the air service, became suspicious of the use which had been made of the Navajo. His suspicions were based on several facts. He had been told by Ted Curtis that he (Curtis) wanted the Navajo to use on a trip East. While the invoice showed that the Navajo would be based in Las Vegas, the conversations remained in Pagan's mind. The gas receipts submitted by Ted Curtis indicated that the Navajo had been fueled at Las Vegas, Nevada, Phoenix, Arizona, and Needles, California. Needles was not a place at which a plane with the range of the Navajo would normally stop for refueling for flights between Las Vegas, Phoenix, and Riverside. It appeared to Pagan that at least one of the seats had been removed and improperly reinstalled; that there was marijuana debris in the aircraft; that the condition of the props indicated that it had been used on dirt or gravel air strips. No one of these facts was in itself conclusive of any illegal use of the Navajo, but they were enough to engender a suspicion in Mr. Pagan's mind. When Ted Curtis approached Riverside Air Service about a further rental of the Navajo, Pagan conveyed his suspicions to the customs officials, and the customs officials, with the approval of Pagan, placed in the aircraft a transponder using a discreet code. The transponder could be electronically triggered and would emit a signal which would enable a radar operator to track the Navajo carrying it.

On November 8, Ted Curtis again rented the Navajo, and at the request of Ted Curtis, three of the passenger seats were removed. On the evening of November 8, the Navajo was observed at the airfield at Litchfield, Arizona, and the defendants Ted Curtis and Cordova were seen securing it.

Subsequently the Navajo was tracked by radar. I find from all of the evidence that it was the only aircraft in the area during the relevant time period with a transponder which signaled the discreet code used by the law enforcement officials. I find that all of the transponder signals received in the area and at the time were signals from the Navajo.

The relevant geography is this: Phoenix lies about 120 miles due north of the Mexican border. Litchfield is a few miles west of Phoenix. Wenden, Arizona, is about 88 miles west by north of Phoenix and slightly more than 100 miles due north of the Mexican border. Buckeye is about 60 miles east by south of Wender. At a point approximately 18 miles south of Wender there is an abandoned military airstrip. Dateland, Arizona, lies between Wender and the Mexican border and is about 38 miles north of the Mexican border.

On November 9, at about 9:50 P.M., the Navajo was tracked from Phoenix traveling toward Gila Bend where the signal was lost. At 10:10 P.M., the Navajo was picked up traveling toward Phoenix.

On November 10, at 12:06 A.M., the Navajo was tracked from Phoenix to Dateland, where the signal was lost. The Navajo next appeared on radar at 3:40 A.M. traveling east from Buckeye. The Navajo landed at Litchfield at 4:00 A.M. At 9:23 P.M. on November 10, the Navajo was tracked from the Phoenix area to Dateland where the signal was lost at about 9:44 P.M. The signal then reappeared at about 12:48 A.M. on

November 11, and the Navajo was tracked flying in a northerly direction to a point about 30 miles south of Wenden where the signal again disappeared at about 12:59 A.M. In the meantime, customs air officers, who had been stationed near Gila Bend, were advised that the Navajo had been picked up at a point near Dateland and was flying in a northerly direction. The customs officers were vectored to the area in an aircraft equipped with a forward-looking infrared scanning device (FLIR). They were unable to detect any airborne aircraft, but, knowing of the abandoned strip near Wenden, flew to it. The strip was scanned by FLIR, and an aircraft with a Navajo silhouette was seen on the strip facing in an easterly direction. The aircraft was unlighted and quite soon a ground vehicle approached it and a short time later another ground vehicle approached. The aircraft remained on the ground for 6 to 10 minutes, and then the aircraft departed the strip without displaying any lights. The customs aircraft followed it a short distance and then returned to the strip to follow the ground vehicles. Interstate Highway 10 lies about a mile north of the strip, and the ground vehicles were picked up again first by FLIR and then by eyesight before they reached Interstate 10. Until they reached Interstate 10 they were driven without lights. The surveilling aircraft concentrated on the lead vehicle. It entered the west-bound lane and traveled about 2 miles in that direction; then it crossed the median, made a 180° turn and headed east on the interstate. Other customs officers who had been waiting in Wenden were alerted, and they traveled to Interstate 10. By blinking lights, they identified the vehicle in which they were riding to the surveilling aircraft and were then directed by the aircraft to a pickup truck with a camper, which they stopped. The camper was driven by Kevin Curtis, and on a search was found to contain

approximately 400 pounds of marijuana. Kevin Curtis was taken into custody. The second vehicle was not followed; and the driver of it escaped.

Customs officers waiting at the Litchfield airfield were advised that the pickup truck had been searched and found to contain marijuana. Shortly thereafter the Navajo landed. Ted Curtis was in the pilot seat, Cordova was in the copilot's seat, and Dulin was riding in one of the passenger seats. All three were arrested.

With respect to the defendants Ted Curtis and Cordova, the evidence shows that both defendants were aboard the Navajo when it landed at Litchfield. Before defendants can be convicted of possession, however, it is necessary to determine that the marijuana which was found in the pickup was taken from the Navajo. I find that the aircraft seen on the strip at 1:02 A.M. on November 11, 1976, was the Navajo which landed in Litchfield a short time later. It was the only plane in the area carrying a transponder which responded to a discreet code. It was tracked to a point about 12 miles from the abandoned strip, traveling in the direction of the airstrip. The identification of the aircraft on the runway as a Navajo was wholly adequate. The Navajo was picked up again at a distance of 5 to 10 miles from the abandoned strip and was tracked to Litchfield. The radar tracking is entirely consistent with a landing at the abandoned strip. There is some discrepancy in the time of the reporting of the radar sighting of the Navajo as it approached Litchfield, but the discrepancy could be explained on the basis of a delay in reporting, and in any event is not sufficient to create any doubt about the identity of the Navajo.

Between October 4 and October 15 the Navajo was flown extensively over the desert near the Mexican border. On its return to Riverside on the 15th there was

evidence of a seat removal and of debris which may or may not have been marijuana. The props indicated landings on gravel and dirt strips.

Seats were removed by order of Ted Curtis before the rental on November 8th. Extensive flying of a high-cost (rental-wise) aircraft over deserted desert areas along the border is in itself a suspicious circumstance. The flight patterns on the 10th and 11th were entirely consistent with the pattern that would be developed by a plane flying to Mexico, loading marijuana and landing on a deserted airstrip in the desert north of the Mexican border. The facts that the flights were made at night and, at least on the 11th, were made without lights, were likewise consistent with smuggling. The vehicular activity on the airstrip and the duration of it are consistent with an unloading of the aircraft. The driving of unlighted vehicles to Interstate 10 indicates an effort at concealment. Marijuana was found in the one vehicle seized. How did it get there? If it wasn't in the vehicle before the Navajo landed, then it follows that it came from the Navajo. If it was in the vehicle before the Navajo landed, why did the vehicle make the strange nighttime rendezvous with a suspicious, unlighted airplane at an abandoned strip in the desert? The inference is inescapable that there was marijuana aboard the Navajo which was loaded and found in the pickup truck.

From the quantity of the marijuana found in the truck and from the fact that the marijuana was transferred from the Navajo to the pickup truck, I infer that the marijuana possessed by the defendants Ted Curtis and Cordova was possessed with the intent to distribute. I infer the requisite criminal intent from all of the circumstances of the case, including the surreptitious character of the events occurring at or near the landing strip.

As to the defendant Kevin Curtis I find:

On the early morning of November 11, 1976, Kevin Curtis drove a pickup truck from the landing strip described in the findings as to Ted Curtis and Dale Cordova to a point on Interstate Highway No. 10 where he was stopped, and the truck he was driving was found to contain approximately 400 pounds of marijuana. From the surreptitious character of the events occurring at the airstrip, the driving without lights, the erratic course of the truck on the highway, I infer that Kevin Curtis knowingly possessed the marijuana with a specific intent to disobey the law. From the quantity of marijuana involved I infer that the possession was with the intent to distribute.

As to the defendant John Dulin:

I ~~found~~ find all of the facts found as to the defendants Ted Curtis and Cordova. I have previously determined that the defendant Dulin was advised of his Miranda rights on two separate occasions, that he did not request an attorney, and that his confession was voluntarily made. As the trier of fact, I find that the confession was voluntarily made.

CONCLUSION

I find all of the facts found as to the defendants Ted that the defendants Ted Curtis, Dale Cordova, Kevin Curtis, and John Dulin are guilty of the crime charged in Count III of the indictment.

Counts I and II of the Indictment are dismissed as to all defendants with prejudice.

DATED this 4th day of March 1977.

/s/ Russell E. Smith

Russell E. Smith
United States District Judge